impeacher of two of his most important weapons of defense—cross examination and prior self-contradiction. WIGMORE EVIDENCE, § 1033. Such prior inconsistent statements are therefore admitted on the ground of necessity and fairness. *State* v. *Lodge,* 9 Houst. 542. There are a number of cases, however, which hold with the dissenting judge that such oral hearsay statements, made out of court, not made under oath, and not *in extremis,* should not be admitted for the purpose of impeaching a dying declaration. *Maine* v. *People,* 9 Hun 113, *Wroe* v. *State,* 20 Ohio St. 460, *State* v. *Hendricks,* 172 Mo. 654, *State* v. *Mills,* 79 S. C. 187, and *Hamilton* v. *Smith,* 74 Conn. 374.

EVIDENCE—RIGHT OF ACCUSED TO CONFRONT WITNESSES AGAINST HIM—ADMISSIBILITY OF TESTIMONY OF WITNESS NOW OUT OF STATE GIVEN ON FORMER TRIAL. Defendant was convicted of murder and upon appeal a new trial was granted. By the time of this second trial one of the witnesses for the prosecution on the former trial had removed from the State and could not be effectively served with a subpoena. Thereupon the official reporter was allowed to read the testimony of the witness as given at the former trial, from his shorthand notes then taken and properly preserved. Defendant contends that the right of the accused in all criminal prosecutions and cases involving life or liberty to be confronted with the witnesses against him was thereby violated. *Held,* (WEAVER, J. dissenting) the admission of such testimony violated no rights of the accused. *State* v. *Brown,* (Iowa 1911) 132 N. W. 862.

It has been held that Article 6 of the Amendments to the Constitution of the United States does not apply in prosecutions in State courts. *West* v. *Louisiana,* 194 U. S. 258, 24 Sup. Ct. 650. But the constitutions in most of the States contain a similar provision. Where a witness dies before the second trial, it has generally been conceded that the former testimony of the witness is admissible, and no right of the accused is violated by its admission. *U. S.* v. *Greene,* 146 Fed. 796, *Kendrick* v. *State,* 10 Humph. 479, *Com.* v. *Richards,* 18 Pick. 434, *State* v. *Kimes,* (Iowa), 132 N. W. 180. Some courts base this upon a construction given to the constitution as a matter of compelling necessity to avoid a failure of justice. *Marler* v *State,* 67 Ala. 55; or upon the ground that the constitutional provision in this regard is but declaratory of the common law, under which this practice is allowed, *State* v. *McO'Blenis,* 24 Mo. 402. Others hold that by being confronted with the witness who undertakes to state the testimony of the deceased, the constitutional requirement is met, leaving only the competency of the evidence to be determined. *Summons* v. *State,* 5 Ohio St. 325. But the real basis for the admission of such testimony is to prevent a miscarriage of justice, and its admission is in reality an exception to, rather than a compliance with, the rule that the accused is entitled to be confronted with the witnesses against him. *Mattox* v. *U. S.,* 146 U. S. 140. In a few jurisdictions such former testimony is not admitted, even in the case of the death of a witness. *State* v. *Potter,* 6 Idaho 584, overruling *Territory* v. *Evans,* 2 Idaho 627, *Kaelin* v. *Com.,* 84 Ky. 354. In Texas it was first held in the case of *Greenwood* v. *State,* 35 Tex. 587 that such testimony was admissible, then in the exhaustively considered opinion of *Cline* v.

State, 36 Tex. Crim. Rep. 320, the contrary rule was adopted,, only to be overthrown by the subsequent decision in *Porch* v. *State,* 51 Tex. Crim. Rep. 7. But where the witness is absent from the jurisdiction, various conditions have been imposed by the different courts as essential in order that his former testimony may be given. It has been said that the absence must be by way of residence, and not merely a temporary sojourn, because otherwise the trial could be postponed until his return. *Jacobi* v. *State,* 133 Ala. 1; or that an effort should be made to persuade the witness' voluntary attendance, *Slusser etc.* v. *Burlington,* 47 Iowa 300. It has also been suggested that an effort should have been made to obtain the witness' deposition by commission. *Berney* v. *Mitchell,* 34 N. J. L. 337. But this is futile, for a deposition is no better than the former testimony. WIGMORE EVIDENCE, § 1404. Many states recognize the absence of the witness as a ground for the admission of his former testimony generally. *State* v. *Nelson,* 68 Kan. 566, *Hurley* v. *State,* 29 Ark. 17, *Adair* v. *Adair,* 39 Ga. 75, *Wheeler* v. *Jenison,* 120 Mich. 422, *Wheeler* v. *McFerron,* 38 Or. 105. A few refuse to recognize it at all. *Wilbur* v. *Selden,* 6 Cow. 162, *Crary* v. *Sprague,* 12 Wend. 41, *Berney* v. *Mitchell,* 31 N. J. L. 337, *Collins* v. *Com.,* 12 Bush. 273, *State* v. *Lee,* 13 Mont. 248. Others refuse to recognize the rule in criminal cases. *Owens* v. *State,* 63 Miss. 450, *State* v. *Houser,* 26 Mo. 431, *Finn* v. *Com.,* 5 Rand. 701, *Brogy* v. *Com.,* 10 Gratt. 722. In *State* v *Conklin,* 133 N. W. 119 the Iowa court, divided as in the principal case, held that even where the testimony of the absent witness had not been taken down in shorthand it was permissible for one who had heard it to give the substance thereof against the accused.

EXECUTION SALE—RIGHT OF PURCHASER ON FAILURE OF TITLE. Plaintiff was a bona fide purchaser of chattels at an execution sale; the chattels were later replevined as the property of a third party and plaintiff sued the execution creditor for money had and received. *Held,* that the purchaser could recover the sum paid by him. *Dresser* v. *Kronberg* (Me. 1911) 81 Atl. 487.

The general rule is that there is no warranty of title at an execution sale, the purchaser takes just what title the defendant in execution had and buys at his peril, the rule of *caveat emptor* applying. *Green* v. *Wintersmith,* 85 Ky. 516. *Barnett* v. *Vincent,* 69 Tex. 685, 5 Am. St. Rep. 98; *Lewark* v. *Carter,* 117 Ind. 206, 10 Am. St. Rep. 40, 3 L. R. A. 440. In the principal case the court allowed a recovery of the full amount paid, which is equivalent to making the sale on execution a sale with warranty of title, the usual amount recoverable for a failure of title in such cases being the amount paid. SUTHERLAND DAMAGES Ed. 3, § 666. *Jeffers* v. *Easton,* 113 Cal. 345, 45 Pac. 680; *Noel* v. *Wheatley* 30 Miss. 181; *Anding* v. *Perkins,* 29 Tex. 348. The question of what remedies if any are to be allowed the purchaser of goods at an execution sale, upon failure of title in the execution defendant, is one upon which there is much conflict of opinion. It has been held by the supreme court of Indiana that if payment has not been made it may be resisted for a failure of title, *Julian* v. *Beal,* 26 Ind. 220, 89 Am. Dec. 460. This rule has been denied in the courts of other States. *McGhee* v. *Ellis,* 4 Litt. 244; *Cameron* v. *Logan,* 8 Iowa 434;